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In The

Supreme Court of the United States

October Term, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

NICHOLAS J. WALLWORK*
FREDRIC D. BELLAMY
CAROLINA L. CARVER
MUCHMORE & WALLWORK, P.C.
2700 North Central Avenue,
Suite 1225
Phoenix, Arizona 85004
Telephone (602) 240-6699

**Counsel of Record for Petitioners*

HPP

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I. Introduction

By granting the Petition, the Court can resolve whether potentially liable parties may state cost recovery claims under the plain language of CERCLA § 107(a), 42 U.S.C. § 9607(a) (1996). Resolving this question would end widespread confusion in the federal courts and would have a controlling legal effect on virtually every CERCLA cost recovery case. Congress intended that privately funded cleanups be the most common cleanups under CERCLA, yet the key statutory incentive to encourage the private spending of literally hundreds of billions of dollars for cleaning abandoned hazardous waste sites is at stake.

As is widely recognized throughout the environmental community, this Petition presents the single most important question in private CERCLA litigation. The Court can decide whether strong private cleanup remedies are statutorily provided, or the Court can allow CERCLA jurisprudence to fracture and languish while critical congressional goals remain frustrated. As explained below, the conflicting interpretations of the courts of appeals have already brought yet another related certiorari petition to this Court – one that simply would not be here if courts followed the plain language of the statute. Many more petitions will be necessary if the issue in this case remains unsettled and the lower courts are thus required to develop new rules under CERCLA necessitated solely by the deviation from the plain statutory language at issue here.

Moreover, the importance of the question presented goes far beyond the interests of the private parties in this litigation. The State of Arizona, joined by the States of Alabama, Arkansas, Georgia, Missouri, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and West Virginia; and the Cities of Phoenix, Scottsdale, Tempe and Tucson, Arizona,

joined by the Cities of Cincinnati, Ohio; Fresno, California; and Seattle, Washington, have briefed the Court regarding the overriding importance of a proper interpretation of CERCLA § 107(a) to the well-being and quality of life in their communities. As the amici curiae stated, unless the Court grants the writ of certiorari and "makes clear that Working PRPs may pursue cost recovery under Section 107(a), the Superfund program will be crippled by the loss of significant incentives to voluntary remediation, leaving the States and Cities with an insurmountable cleanup burden." (Brief for Amicus Curiae in Support of Petition for Writ of Certiorari, *Pinal Creek Group v. Newmont Mining Corp.*, No. 97-795 (U.S. filed Jan. 12, 1998)).[1] For the reasons stated in the amici curiae brief, the current petition and herein, Petitioners respectfully request that the writ of certiorari be issued.

REASONS TO GRANT THE PETITION

A. The Existing Cases Have Created a Genuine Split of Authority Regarding a Legal Question that the Circuits Have Recognized as Needing Urgent Resolution.

The overriding need for a clear answer to the question presented – whether potentially liable parties may state cost recovery claims under CERCLA § 107(a) – has been recognized by each appellate court that has reviewed this issue. In certifying interlocutory appeals on the same purely legal question presented here, the Ninth Circuit – as well as the Sixth Circuit and a certifying district court in the Second Circuit – clearly disagreed with Respondents' suggestion that the law in this area is settled. The courts instead recognized that a prompt resolution of the conflicting interpretations of the question was necessary. *See Pinal Creek Group v. Newmont Mining*

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[1] Many other governments (as well as private parties) will join in supporting Petitioners if certiorari is granted.

Corp., No. 96-80193 (9th Cir. July 15, 1996) (order granting interlocutory appeal); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, No. 96-8342, slip op. at 2 (6th Cir. Feb. 13, 1997) (order granting petition for permission to appeal) (noting that "the district courts in this circuit are divided and the decisions of other circuits are not entirely consistent"); *Cooper Indus., Inc. v. Agway, Inc.*, No. 97CV0748, 1997 U.S. Dist. LEXIS 19192, *20-23 (N.D.N.Y. Nov. 14, 1997) (certifying question presented to the Second Circuit and noting that this issue has generated much discussion). These courts each concluded that they should not delay in providing with a clear answer to the question presented here, and recognized that their interpretation of CERCLA § 107(a) would have a controlling legal effect on CERCLA litigation.

The same considerations underlying the decisions of numerous circuits to review the question presented under 12 U.S.C. § 1292(b) militate heavily in favor of granting the current petition. Where, as here, resolution of a legal issue will have controlling effects on the course of litigation, this Court has recognized that certiorari is warranted. Illustratively, in *Gillispie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court stated that it had granted the writ of certiorari because the circuit court's interlocutory ruling was "fundamental to the further conduct of the case." *Id.* at 152 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)) (stating that certification of the appeal under § 1292(b) would have rendered the court of appeals' jurisdiction "unquestionably . . . proper" and that the same underlying policies warranted certiorari). This controlling legal effect will be fundamental not just to this case, but also to the hundreds of other CERCLA cases now pending in the federal courts. Thousands more CERCLA cases undoubtedly will be filed relating to the tens of thousands of hazardous waste sites already identified by the federal

government where private funds must provide the majority of the cleanup dollars.

Notwithstanding the federal circuits' recognition of the need to provide litigants with an answer to the question presented, the lower courts have failed to develop a consistent interpretation of the statutory language of CERCLA § 107(a). Instead, as discussed in the petition, the circuits have already developed three distinctly different statutory interpretations. Consequently, the existing split of authority will become only more aggravated as additional circuits endorse one of the existing statutory interpretations or develop additional inconsistent interpretations. No matter how the Sixth Circuit, and perhaps the Second Circuit, ultimately answer the question presented, confusion will continue to abound throughout the remaining federal jurisdictions.

A recently filed petition for certiorari from the Tenth Circuit pointedly demonstrates the existence of both the split of authority and the need for an immediate resolution of this issue. In *Browning-Ferris, Inc. v. Sun Co., Inc,* the defendants have filed a petition for writ of certiorari that raises essentially the same question presented in this case. *See* Petition for Writ of Certiorari for Defendants-Appellants, *Browning-Ferris, Inc. v. Sun Co., Inc.*, (U.S. filed December 12, 1997) (No. 97-995). Both the Browning-Ferris petitioners, who are CERCLA defendants, and Petitioners in this case, who are CERCLA plaintiffs, agree that a split exists between the Ninth Circuit's decision and those of other circuits regarding the proper interpretation of CERCLA § 107(a).[2] Indeed, the Tenth Circuit

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[2] As discussed in the petition, the Seventh Circuit has a unique view that gives rise to a three-way split of authority among the circuits. Under the Seventh Circuit's view, parties who are liable but "blameless" of fault may state claims under CERCLA § 107(a). *See Rumpke of Ind., Inc. v. Cummins Engine Co.,*

petitioners devote much of their petition to bitterly attacking the Ninth Circuit's decision in *this* case.[3]

The circuits, of course, cannot address this problem outside their own geographical jurisdictions and have not provided the uniform answer needed. In light of the existing split of authority, inconsistent application of the same statutory language is thus already assured. Furthermore, both the unequal treatment of potentially liable parties and choice-of-law disputes are inevitable. Unless this Court grants the Petition to resolve the existing split of authority, unfairness and confusion will fester. Given the important and urgent need to have the question presented resolved, certiorari is warranted.

B. The Petition Presents the Ideal Record to Resolve the Existing Split of Authority Because, Uniquely Among the Dozens of Reported or Pending Cases, this Record Directly Implicates the Plain Meaning of "Contribution" in the Language of CERCLA § 113(f).

The record presented by the Petition in this case constitutes a superior record on which to resolve whether potentially liable parties may state claims under CERCLA § 107(a), § 113(f), both sections, or neither section.

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107 F.3d 1235, 1240 (7th Cir. 1997). Petitioners, however, have never had a practical opportunity or reason to allege the facts of their "blamelessness" because the Seventh Circuit's interpretation has never been endorsed or applied in the Ninth Circuit. Accordingly, resolution of the Seventh Circuit's conflict with the Ninth Circuit is critical for petitioners to determine if such allegations are now necessary.

[3] Petitioners respectfully suggest that the Court may find it beneficial and efficient to consider both petitions concurrently. As the Tenth Circuit defendants' petition illustrates, the statute of limitations issue explicitly raised in *Browning-Ferris* is inextricably intertwined with the resolution of the question presented here.

Uniquely among all pending or reported cases to date, the record here would allow the Court to address the situation in which the potentially liable parties' claims do not fall within the traditional definition of "contribution," and therefore do not fall strictly within the plain language of CERCLA § 113(f).

Whereas the literal text of CERCLA § 107(a) creates a cause of action for any person who incurs properly qualified cleanup costs, § 113(f) provides certain parties with a right only to seek "contribution" from other liable parties. 42 U.S.C. § 9613(f) (1996). Congress intended § 113(f) simply to "clarif[y] and emphasize[ ] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. No. 99-253 (pt. III), at 18 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3041. Petitioners have not settled with EPA and are not defendants in a CERCLA action in this case, and therefore do not fall into either category of "contribution" plaintiff within the plain meaning of that term. Thus this case's factual record unquestionably implicates the plain meaning of the term "contribution" used in the statutory language.[4]

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[4] The question presented in the petition arises solely in the context of Respondents' motion to dismiss or for judgment on the pleadings, yet Respondents disingenuously attempt to inject entirely speculative matters outside the record as grounds for declining certiorari. In addressing the question presented, the Court properly would ask only whether the facts alleged in the pleadings would state a cause of action under the applicable statute. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (granting certiorari to address question of whether "[t]he allegations of the complaint, if proved, would establish [petitioners' legal claim]").

Under the traditional definition of contribution approved by Congress in drafting CERCLA § 113(f), contribution plaintiffs must have been externally "compelled" to discharge their liability to another party pursuant to a judgment or settlement.[5] Therefore, parties deemed "volunteers," such as the Petitioners here, do not have contribution rights.[6]

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[5] One academic commentation explains how contribution principles apply to CERCLA's basic scheme by using an example in which "A" has conducted a cleanup without an order, jugdgment or settlement:

> To have a cause of action for contribution, A must prove that he discharged the liability to a third party, paid more than his share of the liability, and acted under "compulsion" or legal duty. . . . The problem is that A did not act under compulsion and as a volunteer cannot recover contribution. . . .
>
> Moreover, A had no legal duty under CERCLA to clean up Site X. CERCLA does not obligate anyone to clean up any site. Parties only have an affirmative duty to conduct a cleanup if they are subject to a section 106(a) administrative or judicial order, if they have entered into a consent decree obligating them to clean up the site, or if some other law requires them to do so. Because this cleanup was undertaken voluntarily, A was under no such compulsion or legal obligation.

Michael V. Hernandez, *Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 117-18 (1997).

[6] Although a potentially liable party may reduce its potential liability if it voluntarily mitigates the harm it inflicted on another, this conduct does not entitle it to seek contribution from other parties. *See, e.g., In re Question Submitted by the United States Dist. Court for the Dist. of Colo. (Coniaris v. Vail Assocs., Inc.)*, 586 P.2d 224, 225 (Colo. 1978)) (explaining that under the common law of contribution, "[n]o cause of action accrues to a joint tortfeasor until there has been a judgment against him or a

Under the common law definition, Petitioners' status as potentially liable parties, by itself, plainly does not give rise to a claim for contribution. Under the statutory language of § 107(a), parties are liable solely for the costs incurred by someone else. Petitioners' hypothetical liability to the government under CERCLA, therefore, would convert Petitioners' claims into contribution claims *only if* the government were to incur response costs because, before then, no liability exists under CERCLA § 107(a).[7]

The status of "volunteers" under CERCLA § 113(f)'s express contribution provision is absolutely critical to resolution of the question presented.[8] Even courts that have limited potentially liable parties to claims under § 113(f) have expressed doubts over whether potentially liable parties who conduct "voluntary" cleanups fit

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settlement of the claim. A claim for contribution is an action separate and distinct from the underlying tort. The rights and obligations of the tortfeasors flow, not from the tort, but from the judgment or settlement itself.").

[7] Respondents have repeatedly referred to Petitioners as "admittedly liable parties." That characterization is flatly wrong. Petitioners have never admitted to being "liable parties." Petitioners have acknowledged only that they are in the class of potentially responsible parties set forth in CERCLA § 107(a), which means that they *would* be liable to another party or the government *if* that other party or the government were to incur cleanup costs in properly performing an environmental cleanup. No such party exists and, therefore, Petitioners are not properly characterized as "liable parties."

[8] The issue of voluntariness under the CERCLA statutory scheme has been the subject of much discussion. *See, e.g.*, Daniel R. Avery, *Statutory Right Or Statutory Prohibition? Reconciling CERCLA's Contribution Protection With The Private Response Cost Recovery Action*, 12 VA. ENVTL. L.J. 367, 371 (1993) (urging resolution of the split of authority by "employing a distinction between voluntarily and involuntarily incurred costs").

within the plain language of CERCLA § 113(f). Illustratively, in *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 119 (1995), the First Circuit acknowledged that a liable party's voluntary cleanup would "fall[] outside the statutory parameters established for an express cause of action for contribution." *Id.* at 99 n.8 (citing 42 U.S.C. § 9613(f)(1)).[9]

This case represents the only opportunity to address the statutory definition of "contribution" on a record that directly presents the issue.[10] To answer the question presented, this Court could focus exclusively on the statutory language of CERCLA § 107(a) and § 113(f) as applied to the assumed facts alleged in the Petitioners' complaint. No "external" facts are necessary or relevant to the question

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[9] Accordingly, if parties like Petitioners do not fall within the language of CERCLA § 113, yet the question presented is answered by divesting these parties of their § 107 claim, parties like Petitioners would not have a clear statutory remedy. Instead of resolving this dilema, however, the Ninth Circuit's ruling below merely departed from the established contribution principles by stating that Petitioners created liability to themselves in conducting their cleanup. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1305-06 (9th Cir. 1997).

[10] The more typical cases, such as the case currently pending before the Sixth Circuit, do not present this issue in the context of an unambiguous record. The plaintiffs in the Sixth Circuit case devoted portions of their appellate briefs to arguing whether an administrative order (as opposed to a judicial order) would render the plaintiffs' claim one in "contribution" at common law or under the statutory language. *See, e.g.*, Final Brief of Plaintiff-Appellants at 25-28, *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, (6th Cir. filed June 25, 1997) (No. 97-3163). Accordingly, review of the Sixth Circuit case (or any other typical CERCLA case) would require the Court to delve into similarly tangential issues. In contrast, the current petition would enable the Court to address the central point of the dispute without having to examine such arcana.

presented.[11] Given the dearth of voluntary cleanups, it is doubtful that such an ideal opportunity will arise again.

CONCLUSION

As the States and Cities have stated in their amici curiae brief in support of the Petition, the current confusion in the law will inevitably discourage private parties from engaging in the type of voluntary cleanup from which this case arises. Resolving the question presented would affect not only virtually every private CERCLA case, but also state and local governments' ability to address environmental contamination through privately funded voluntary cleanups.

Therefore, the Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NICHOLAS J. WALLWORK*
FREDRIC D. BELLAMY
CAROLINA L. CARVER
MUCHMORE & WALLWORK, P.C.
2700 North Central Avenue,
Suite 1225
Phoenix, Arizona 85004
(602) 240-6699

*Counsel of Record
for Petitioners*

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[11] Commentators have noted that extraneous considerations have distracted interpreting courts from a more disciplined focus on the plain text of CERCLA § 107(a) and § 113(f). One such commentator even likened the federal courts' disjointed efforts to interpret the statutory provisions to the blind mens' efforts to describe an elephant in the famous parable. *See* Ann Alexander, *Standing under Superfund §§ 107 and 113: Avoiding the Error of the Blind Men and the Elephant*, TOXIC L. RPTR. (BNA) 155 (July 12, 1995) (analyzing the "firestorm" of litigation over the relationship between CERCLA §§ 107(a) and 113(f)).